

## **Remarks**

Applicants appreciate the Examiner's attention to the above referenced application. Reconsideration of the application is respectfully requested. Claims 1, 3-25 were rejected. Claim 2 has been cancelled. Claims 1, 5, 8, 14-16 and 20-21 have been amended. Claims 1 and 3-25 are now pending, of which claims 1, 8, 14, 16 and 20 are independent.

Applicants note with appreciation that the Examiner has indicated that Claim 2 is directed to allowable subject matter. Claim 2 was objected to as being dependent upon a rejected base claim, but was indicated to be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Various limitations of Claim 2 have been added to the independent claims to more explicitly recite the negotiation method and system of the claimed embodiments.

## **ARGUMENT**

Claims 1, 3, 8, 9, 14, 15, 16, and 20-22 are rejected under 35 U.S.C. 102(e) as being anticipated by Tobias et al. 7,293,165 (Hereinafter Tobias). This rejection is respectfully traversed and should be withdrawn based on the above amendments and following discussion.

First, it should be noted that the Examiner has failed to cite prior art references with any specificity. Instead, the Examiner relies on entire columns (3 and 4) of Tobias without explicitly indicating where each claimed limitation is found. A review of the cited columns seems to indicate that Tobias teach a system where a baseboard management controller (BMC) is used for communicating with a remote computer where the remote computer may download BIOS updates and patches to BMC. However, Tobias do not seem to teach or suggest a method or system where a recipient system with a BMC negotiates with one or more donor systems to receive a compatible *operational firmware* image. It should be noted that an operational firmware image is used for executing the BMC code, rather than code on the host processor. Thus, Tobias fails to show every limitation of the claims, as originally filed. However, in order to expedite allowance of the pending claims, various limitations of Claim 2 have been added to each of the independent claims to more explicitly recite the negotiation aspects of the claimed embodiments. Further, it seems that Tobias teach merely receiving a BIOS image update at the

BMC, but does not teach the request/acknowledgement/offer/acceptance negotiation described and claimed by Applicant.

Further, Tobias teach a network with one remote computer 402 (Fig. 4) updating many servers 404, 406, 408, 410, 412. Thus, it will be apparent to one of skill in the art that Tobias cannot show the claimed negotiation, as a server (recipient system) has no choice of from where to receive an image update. In contrast, Claim 1, as amended to include limitations of Claim 2, requires the negotiation of sending a message request over a network, receiving a message request by at least one donor system in the network; determining whether the donor system has a compatible image; when the donor system has a compatible image, sending an acknowledgement and offer to the recipient system; and then uploading the compatible image sent by the donor system.

Claim 8 has been amended to require, in part, wherein negotiating with a donor system further comprises instructions to: receive an acknowledgement from at least one donor system in response to the message request sent over the network, where an acknowledgement is sent by each donor system having a compatible image; when more than one acknowledgement is received by the recipient system, select a donor system from the at least one donor system sending an acknowledgement based on the predetermined policy, and when only one acknowledgement is received, select the one donor system sending the acknowledgement; receive a compatible image from the selected donor system. Tobias do not teach this type of negotiation, especially the requirement that there may be more than one donor system sending an acknowledgement for a request for operational firmware update. Thus, the rejection should be withdrawn for Claim 8 and its progeny.

Claim 14, as amended requires a donor system to receive the message request, wherein the message is sent to at least one donor system on the network. Tobias do not teach that the message may be sent to more than one donor system. Moreover, a cursory review of Tobias Columns 3 & 4 only reveals that a BIOS image is received by the BMC, and does not seem to teach or suggest a request sent over a network, or the negotiation as claimed: "wherein negotiating further comprises instructions to send an acknowledgement and offer to the recipient system when the donor system has a compatible server management image." Tobias do not seem

to teach an acknowledgement and offer, but merely the transmitting of a BIOS image from a remote computer. Thus, the rejection to Claim 14 and its progeny should be withdrawn.

Claim 16 is amended to require a BMC to “negotiate with the at least one donor server for a compatible image, based on a received acknowledgement that the at least one donor system has a compatible image, where the BMC is configured to use a predetermined policy to select a donor system from a set of the at least one donor system having a compatible image and returning an acknowledgement and offer in response to the request for an updated image; and receive an update compatible image from the selected donor system.” Tobias do not seem teach or suggest the negotiation with multiple donor systems or the selection of a single donor system from which to receive the image update. Thus, the rejection to Claim 16 and its progeny should be withdrawn.

Claim 20, as amended, requires that the message is sent to at least one donor system on the network, and wherein negotiating further comprises sending an acknowledgement and offer to the recipient system when the donor system has a compatible operational server management image, and receiving an acceptance acknowledgement for the offer. Tobias do not teach or suggest that the request message is sent, or that it is sent to more than one donor system on the network. It seems that Tobias (at Col. 3 and 4) teach only receiving a new BIOS image at the BMC. Further, the negotiation between the selected donor system and recipient system is not taught or suggested by Tobias. Thus, the rejection to Claim 20 and its progeny should be withdrawn.

Claims 4-7, 10-13, 17-19 and 23-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tobias in view of "Official Notice". Applicants respectfully traverse this rejection, which should be withdrawn for at least the reasons set forth herein.

Claims 4-7, 10-13, 17-19, and 23-24 are believed allowable, at least by being dependent on an allowable base claim. Tobias fails to show, even in combination with official notice of out-of-band methodology, all of the limitations in the claims, as discussed above.

Claims 1, 3-5, 8-11, 14-17 and 20-23 are rejected under 35 U.S.C. 102(e) as being anticipated by Kutch 20050038808 (Hereinafter Kutch). Applicants respectfully traverse this rejection, which should be withdrawn for at least the reasons set forth herein.

Independent Claims 1, 8, 14, 16 and 20 have been amended to more clearly recite that the recipient system sends a message to a plurality (or at least one) donor system on the network, and the negotiation of acknowledgement and offer that subsequently takes place, based on the recipient systems predetermined policy. Kutch does not teach sending a message by the recipient system to request an operational firmware update, but merely the push of a BIOS update request from a remote computer. Further, Kutch does not teach or suggest the acknowledgement and offer negotiation as described and claimed. Therefore, the rejection should be withdrawn.

Claims 4-7, 12-13, 18-19 and 24-25 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Kutch in view of "Official Notice." This rejection is respectfully traversed and Claims 4-7, 12-13, 18-19, 24-25, 27, and 33-34 are believed allowable based on the foregoing and following discussion.

Without conceding the propriety of combining these references, Applicants respectfully submit that Kutch cannot be used as a reference to render the present invention unpatentable under § 103(a). More specifically, Applicants respectfully point out that Kutch is co-owned by the assignee of the present application. As articulated in 35 U.S.C. 103(c):

"Subject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person"

Since Kutch does not qualify as a reference under 35 U.S.C. 102 (a), (b), (c) or (d), it may only be deemed prior art under 35 U.S. C. §102 (e), (f) or (g). As a result, pursuant to 35 U.S.C. §103(c), Applicants respectfully submit that Kutch does not preclude patentability of the presently claimed invention since Kutch and the presently claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person. More specifically, Kutch is assigned to Intel Corporation, the

same entity to which the current application is assigned (assignment recorded on Jan. 12, 2004, at Reel/Frame 014253 / 0339). As such, Applicants respectfully submit that Kutch is an improper reference for use against the presently claimed invention and Applicants request the Examiner to withdraw the rejection to Claims 4-7, 12-13, 18-19, 24-25, 27, and 33-34 under 35 U.S.C. §103.

### **CONCLUSION**

In view of the foregoing, Claims 1 and 3-25 are all in condition for allowance. If the Examiner has any questions, the Examiner is invited to contact the undersigned at (703) 633-6845. Early issuance of Notice of Allowance is respectfully requested. Please charge any shortage of fees in connection with the filing of this paper, including extension of time fees, to Deposit Account 50-0221 and please credit any excess fees to such account.

Respectfully submitted,

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